IT 04-2
Tax Type: Income Tax
Issue: Claim Issues – Properly and Timely Filed

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS

THE DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS	**No. 02-IT-0000** **FEIN: 00-0000000** **Tax yr.: 12/31/91**
v.	
ABC MUTUAL INSURANCE CO. & SUBSIDIARIES, Taxpayer	**Charles E. McClellan Administrative Law Judge**

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

Appearances: Jessica V. Arong, Special Assistant Attorney General, for the Illinois Department of Revenue (the "Department"); David A. Hughes, of Horwood, Marcus & Berk, Chartered, for ABC Mutual Insurance Co., (the "Taxpayer").

Synopsis:

This matter involves a refund claim filed by Taxpayer on an amended Illinois corporation income tax return (Form IL-1120-X) for the tax year ended December 31, 1991. The issue in this case is whether that refund claim was properly and timely filed. The parties filed simultaneous motions for summary judgment. Both of the motions for summary judgment are supported by memoranda that, in turn, are supported by affidavits and supporting documents. Each party filed a response to the other party's memorandum and Taxpayer filed a Reply Brief with three exhibits attached, labeled "A"

"B" and "C". For the reasons set forth herein, I am granting the Department's motion and denying Taxpayer's motion.

Facts on Which the Motions are Based

1. Taxpayer is an Ohio corporation with its principal place of business located in Columbus Ohio. Aff[1]. ¶ 4; Dept. Memo[2] p. 6.

2. Taxpayer and its affiliates are engaged in the business of selling life, property and casualty insurance and related insurance services. John Doe Aff. ¶ 5.

3. The Department has no record of Taxpayer electing to file a combined income and replacement tax return for 1991 or of being assigned as the "designated agent" of its affiliate, XZY Life Insurance Co. ("XZY"), for filing its Illinois income and replacement tax returns for the 1991-tax year pursuant to the directions set forth in 86 IL. Admin. Code § 100.5210(a)(2). Aff. ¶ 14.

4. Taxpayer and certain members of its unitary business group, but not including ("XZY"), filed Illinois income and replacement tax returns (Form IL-1120) for the taxable year ended December 31, 1991 apportioning their income on a unitary basis for the taxable year ended December 31, 1991.[3] Aff. ¶ 4; John Doe Aff. ¶ 6; Dept. Exs. No. 15, 18.

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[1] Affidavit of John Doe (the "John Doe Aff."), Taxpayer's Tax Manager, attached to Taxpayer's Memorandum in Support of Taxpayer's Motion for Summary Judgment (the "Taxpayer Memo"). Affidavits attached to the John Doe Affidavit, identified by letter, are referred to as "John Doe Ex. l". Taxpayer's exhibits that are numbered will be referred to as "Taxpayer Ex. No. n".

[2] The Department's Memorandum in Support of Its Motion for Summary Judgment (the "Dept. Memo") is supported by the affidavit of Janet Sieferman (the "Sieferman Aff."), who is employed by the Department as a Technical Reviewer, and by the affidavit of Dale V. Blanchard (the "Blanchard Aff."), the Department's auditor that examined the tax returns involved in this matter. The Department's exhibits are referred to as "Dept. Ex. No. n".

[3] It is unclear from the record whether Taxpayer filed a combined return for the 1991-tax year for itself and the other members of its unitary business group, other than XZY, or whether they filed on a separate return basis. The Blanchard affidavit states that the Taxpayer filed on a combined basis. Blanchard Aff. ¶ 4. The John Doe Affidavit states that Taxpayer and the members of its unitary business group filed on a separate company basis. John Doe Aff. ¶ 6. Both Parties agree that XZY filed a separate return for the 1991-tax

5. XZY filed a separate original Illinois income and replacement tax return for 1991 on October 14, 1992. Blanchard Aff. ¶ 6, Sieferman Aff. ¶¶ 12, 13, Dept. Ex. No. 13; John Doe Aff. ¶ 6.

6. Taxpayer's IL-1120 for 1991 was received by the Department on October 9, 1992. Dept. Ex. No. 21.

7. The Department audited Taxpayer's Illinois income tax returns for the tax years ended 12/31/91 through 12/31/93 (the "tax years") and included XZY in Taxpayer's unitary business group. Blanchard Aff. ¶ 4, 8, Dept. Ex. No. 3, 8; John Doe Aff. ¶¶ 8, 14.

8. On August 17, 1998, the Department issued a Notice of Deficiency to Taxpayer assessing additional tax, penalties and interest for the 1991 and 1992 tax years. Blanchard Aff. ¶¶ 7, 8, Dept. Exs. No. 1, 2; John Doe Aff. ¶ 14, John Doe Exs. A, B.[4]

9. The Department calculated the additional tax assessed for each of the three years using the single factor apportionment formula for insurance companies prescribed in IITA § 5/304(b)[5] which is a fraction in which the numerator is Taxpayer's gross premiums written for property or risk in Illinois for that year and the denominator is Taxpayer's gross premiums written for property or risk everywhere for that year. *Id.*

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year, however. *Id.*, Blanchard Aff. ¶ 6. This discrepancy does not create a genuine issue of material fact precluding summary judgment because neither party has raised the discrepancy as a genuine issue of material fact, the discrepancy would not change the deficiency calculation and my conclusion of law would be the same in either case.

[4] Also on August 17, 1998, the Department issued a separate Notice of Deficiency to Taxpayer for the year ended December 31, 1993 that is not involved in this matter.

[5] Unless otherwise noted, all statutory references are to 35 ILCS 5/101, *et seq*., the Illinois Income Tax Act ("IITA" or the "Act").

10. Because XZY was determined to be a member of Taxpayer's unitary business group that filed a separate tax return for the 1991-tax year, the Department excluded XZY Illinois premiums from Taxpayer's numerator for the 1991-tax year, but not from the denominator. *Id.*, Dept. Ex. 10.

11. Because XZY, although a member of Taxpayer's unitary business group, filed a separate tax return for the 1991-tax year, the Department issued XZY a separate Notice of Deficiency on August 17, 1998. That Notice of Deficiency was replaced by a corrected Notice of Deficiency dated September 2, 1998 assessing additional tax of $336,651. Blanchard Aff. ¶ 8, Dept. Ex. No. 3; John Doe Aff. ¶¶ 14-18, John Doe Exs. D, E.

12. The Department calculated the additional tax assessed XZY for the 1991-tax year using the single factor apportionment formula for insurance companies prescribed in IITA § 5/304(b). The numerator of the fraction was XZY's gross premiums written for property or risk in Illinois in the 1991-tax year and the denominator was Taxpayer's gross premiums for written for property or risk everywhere for that year for the entire unitary business group, including the gross premiums of XZY. *Id.*

13. After the Notices of Deficiency were issued, the Department agreed to abate all penalties assessed. John Doe Aff. ¶ 19.

14. On October 21, 1998, Taxpayer submitted three checks to the Department for the following liabilities:

- $2,635,815 in payment of the tax deficiencies and interest listed for Taxpayer's unitary business group for the three tax years, including the XZY liability for the 1991-tax year;
- $6,599 for ABC Mutual Fire Insurance Co., an affiliate not included in Taxpayer's unitary business group; and
- $4,525 for XXX Mutual Insurance Company, another affiliate not included in Taxpayer's unitary business group.

15. These payments totaled $2,646,939. John Doe Aff. ¶ 20, Taxpayer's Reply Brief Exs. B, C.

16. The October 21, 1998 payment of $2,635,815 included $601,524 that was the balance of tax that Taxpayer owed for the 1991-tax year as reflected in the Notice of Deficiency issued to Taxpayer. It also included $336,651 that was the amount of tax due that was reflected in the Notice of Deficiency issued to XZY for the 1991-tax year. Dept. Exs. No. 15, 16; John Doe Aff. ¶21.

17. On October 15, 1999, Taxpayer filed a refund claim (IL-1120-X) for the 1991-tax year on which it reported subsequent payments of $601,524 on Line 3, Part II of the IL-1120-X form. It did not include the $336,651 amount for XZY that was included in the October 21, 1998 payment. John Doe Aff. ¶ 23-26, John Doe Ex. F.

18. Taxpayer attached a schedule to the October 15, 1999 claim listing all members of its unitary business group including XZY, and it included the premiums of XZY in the numerator and in the denominator of the apportionment factor used to calculate the amount of the refund. *Id.* at ¶¶ 27, 28; Dept. Ex. No. 9.

19. The Department did not act on Taxpayer's refund claim within 6 months so Taxpayer deemed its claim denied as provided by IITA § 5/909(e), and filed a protest on May 22, 2000. Dept. Ex. Nos. 21, 22.

20. On September 8, 2000, Taxpayer filed a second claim for refund on Form IL-1120-X for the 1991-tax year changing the amount of subsequent tax payments reported on Line 3, Part II of the IL-1120-X form to $938,175. John Doe Aff. ¶ 23, John Doe Aff. Ex. G.

21. The difference in the amount of subsequent payments on the two forms is $336,651 ($938,175 minus $601,524), the amount paid for XZY that was included in the October 21, 1998 payment submitted by Taxpayer, but not included in the subsequent payments total reported on Line 3, Part II of the first IL-1120-X form. *Id*. at ¶ 26; Sieferman Aff. ¶¶ 9, 10.

22. The Department denied the second claim filed by Taxpayer on September 8, 2000 in a Notice of Denial dated June 6, 2001. The denial was based on the Department's determination that the claim was not timely filed. Dept. Ex. No. 25; John Doe Aff. ¶ 32, John Doe Ex. H.

23. On June 8, 2001, Taxpayer's counsel, acting under a power-of-attorney, signed a Form IL-870-AD agreeing to tax and penalty assessments for the three tax years, 1991, 1992 and 1993. Dept. Ex. No. 19, Taxpayer Ex. No. 3.

24. On June 12, 2000, an order was entered closing this matter on the basis of the Form IL-870-AD Taxpayer signed. Taxpayer Ex. No. 3.

25. On August 2, 2001, Taxpayer filed its protest to the denial of the claim filed on September 8, 2000, and this matter was reopened in the Department's Office of

Administrative Hearings and assigned the original docket number identifying this matter, 02-IT-0020. Dept. Ex. No. 27

Conclusions of Law:

The issue in this case, as stated in the pre-trial order dated April 10, 2003, is whether the second IL-1120-X Taxpayer filed on September 8, 2000 for the 1991-tax year was properly and timely filed.

The Department audited Taxpayer's Illinois tax returns for 1991, 1992 and 1993. It issued a notice of deficiency to Taxpayer on August 17, 1998, and one to XZY on September 2, 1998. Because the Department determined that XZY was a member of Taxpayer's unitary business group in 1991, it included the taxable income of XZY in the computation of the combined income of Taxpayer's unitary business group to calculate the deficiency calculation for 1991. It then apportioned the combined taxable income to Illinois using the single factor formula specified for insurance companies prescribed in IITA § 5/304(b). This formula consists of a fraction in which the numerator is taxpayer's gross premiums written for property or risk in Illinois for the year and the denominator is taxpayer's gross premiums written for property or risk everywhere for that year.

The Department calculated the deficiency for Taxpayer and the members of its unitary business group, other than XZY, by apportioning their combined taxable income using the gross premiums apportionment formula. The numerator of the formula consisted of the group's gross premiums written for property and risks in Illinois during the year. The denominator of the apportionment formula included the gross premiums written for property and risks everywhere by the entire unitary business group, including XZY.

The Department then calculated a separate deficiency for XZY by apportioning the combined income of the unitary business group by an apportionment formula in which the numerator was XZY's gross premiums written for property and risks in Illinois and the denominator of which consisted of the gross premiums of the entire unitary group written for property and risks everywhere by all of the members of the unitary business group including XZY. These calculations reflected the fact that although XZY was a member of Taxpayer's unitary business group for 1991, it filed a separate tax return for that year.

On October 21, 1998, Taxpayer submitted three checks to the Department in payment of the amounts assessed in the Notices of Deficiency for all three years for Taxpayer and its affiliates. One of the checks included the amount of the tax reflected in the Notice of Deficiency issued to XZY for 1991in the amount of $336,651.

On October 15, 1999, Taxpayer filed a refund claim on form IL-1120-X for the 1991 year. It claimed $601,524 on Line 3, Part II of the form as the amount of subsequent payments it made. This amount did not include the $336,651 amount that it paid on October 21, 1998 for the tax deficiency assessed on the Notice of Deficiency the Department issued to XZY for 1991. Taxpayer attached a schedule to the form IL-1120-X listing all of the affiliates included in its unitary business group including XZY and it calculated the amount of refund due by including the XZY premiums in the numerator and in the denominator of its apportionment formula.

The Department failed to act on the IL-1120-X within six months, so Taxpayer deemed the claim denied as provided by IITA § 5/909(e) and filed a protest on May 22, 2000. On September 8, 2000, Taxpayer filed the second IL-1120-X for 1991 amending

the amount of subsequent payments reported on Line 3, Part II of the form to include the $336,651 amount paid to satisfy the amount of tax assessed on the Notice of Deficiency issued to XZY for 1991. On June 6, 2001, the Department denied the second IL-1120-X claim for being untimely. Taxpayer filed a protest to this denial on August 2, 2001.

On June 8, 2001, Taxpayer's counsel, acting on the authority of a power of attorney, signed a form IL-870-AD – Offer of Waiver of Restrictions on Assessments and Collection of Deficiency in Tax and Acceptance of Overassessment. The Department signed the form on June 12, 2001. The IL 870-AD listed reductions in Taxpayer's tax liability for each of the years 1991, 1992 and 1993.

Prior to 1993, unitary groups of corporations were not required to file combined income and replacement tax returns. The requirement that members of a unitary business group file a single combined tax return first applied to tax years ending on and after December 31, 1993. Specifically, in relevant part, the statute provides as follows:

> (e) For taxable years ending on or after December 31, 1985, and before December 31, 1993, taxpayers that are corporations (other than Subchapter S corporations) having the same taxable year and that are members of the same unitary business group may elect to be treated as one taxpayer for purposes of any original return, amended return which includes the same taxpayers of the unitary group which joined in the election to file the original return, extension, claim for refund, assessment, collection and payment and determination of the group's tax liability under this Act. This subsection (e) does not permit the election to be made for some, but not all, of the purposes enumerated above. 35 ILCS 5/502(e).

The Department's regulations explain the statute and specify how unitary groups that do not file combined returns for years prior to 1993 will be treated. Specifically, in relevant part the regulation provides as follows:

> a) If, on audit, the Department determines that two or more

> corporations are members of a unitary business group for which no combined return was filed:
>
> (1) For taxable years ending on or after December 31, 1985 and before December 31, 1993, any audit liabilities determined by the Department will be proposed and processed on a separate unitary return basis. If Notices of Deficiency are issued, they will be issued to each Illinois taxpayer and will reflect that taxpayer's Illinois income tax liability computed on a separate return basis. 86 IL. Admin. Code § 100.5280(a).
>
> The election to file a combined return shall be upon the condition that all eligible members shall consent to this Subpart P, and shall consent to be represented by the designated agent appointed on the Schedule UB in all matters described in Section 100.5220 of this Part. The filing of a combined return that includes the income and factors of any eligible member shall be the consent as to that member. If an eligible member fails to have its income and factors included in the combined return, then the tax liability of that member shall be determined on the basis of a separate unitary return unless the failure of such member was due to a mistake of law or fact, or to inadvertence (as determined by the designated agent) in which case the failure must be corrected prior to the issuance of any Notice of Deficiency. Where such failure is corrected, such member shall be treated as if it had properly consented and been included in the election from the beginning. 86 IL. Admin. Code § 100.5210(a)(2).
>
> If a unitary business group does not elect to file a combined return, each Illinois taxpayer member of that group will be treated as a separate taxpayer for all Illinois income tax purposes except for the apportionment of unitary business income. Such taxpayers shall each file their own separate unitary returns. 86 IL. Admin. Code § 100.5205(c)

In this case, XZY filed a separate return for the 1991-year. It was not in combination with the Taxpayer. The Department has no record of Taxpayer electing to file a combined return for 1991; and it has no record of Taxpayer being designated the

agent for filing a combined return for Taxpayer's unitary business group in accordance with the relevant regulation, IL. Admin. Code § 100.5210(a)(2). Therefore, following the mandates in Sections 100.5205(c) and 100.5280(a) of the regulations, when the Department issued the notices of deficiencies for 1991, it issued a separate notice of deficiency to Taxpayer and a separate notice of deficiency to XZY because the regulation required them to be treated as separate taxpayers for that year. When Taxpayer filed its original Form IL-1120-X it included XZY's income and factors in the group's income and tax calculations. However, this form did not cure the defect resulting from XZY not being originally included in a combined return with Taxpayer because it was filed after the Notices of Deficiency were issued, not prior thereto as required by § 100.5210(a)(2) of the regulations.

The second Form 1120-X Taxpayer filed included the XZY deficiency payment in the amount of subsequent payments it claimed, but that did not cure its problem caused by the fact that XZY filed a separate return for 1991 as a separate taxpayer, nor did it cure its problem caused by the fact that the original form IL-1120-X was filed after the notice of deficiency was issued. Therefore, it was not properly filed. Because XZY filed a separate income tax return for the 1991 year, as the statute and regulations specify, it was a separate taxpayer for that year and required to be treated as such by the regulations even though it was a member of Taxpayer's unitary group.

The time within which a claim for refund may be filed is set forth in IITA § 911 as follows:

> (a) In general. Except as otherwise provided in this Act:
>
> (1) A claim for refund shall be filed not later than 3 years after the date the return was filed (in the case of returns

> required under Article 7 of this Act respecting any amounts withheld as tax, not later than 3 years after the 15th day of the 4th month following the close of the calendar year in which such withholding was made), or one year after the date the tax was paid, whichever is the later; and
>
> (1) No credit or refund shall be allowed or made with respect to the year for which the claim was filed unless such claim is filed within such period. 35 ILCS 5/911(a).

On October 15, 1999, Taxpayer filed its first refund claim on form IL 1120-X for 1991. Having been filed within one year from October 21, 1998 when the tax liability was paid, it was within the one-year statutory period for filing claims. On May 22, 2000, because six months had passed from the date it filed its refund claim, Taxpayer filed a protest to the deemed denial of the claim pursuant to IITA § 5/909(e). On September 8, 2000, it filed the second claim to include the subsequent payment of the XZY liability on line 3 of Part II of the form 1120-X that had been excluded from that line on the first form IL-1120-X. This form IL-1120-X was outside of the three year period following the filing of the Taxpayer's tax return for the 1991-tax year, and beyond the one-year statutory period after payment. This late filing was the basis for the Department's denial on June 6, 2001.

On June 8, 2001, Taxpayer's counsel acting under the authority of a power of attorney signed a form IL-870-AD entitled *Offer of Waiver of Restrictions on Assessments and Collection of Deficiency in Tax an Acceptance of Overassessment.* The Department signed the form on June 12, 2001. This form reflected a decrease in tax for each of the three years, 1991, 1992 and 1993, and a decrease in penalty for 1993. On August 2, 2001, Taxpayer filed a protest to the denial of the second refund claim.

The second refund claim is outside of the statutory limitation period for two

reasons. First, it was filed after the claim periods specified in IITA § 911. Second, by its terms, the IL-870-AD, signed before Taxpayer filed its protest to the second refund claim, bars reopening the case involving the year 1991, 1992, and 1993 "in the absence of fraud, malfeasance, concealment, or misrepresentation of a material fact or important mistake in mathematical calculation, …." It provides further that " no claim for refund shall be filed or prosecuted for other than the amounts of overpayment shown above for the above stated years." Therefore, when Taxpayer's counsel signed the IL-870-AD Taxpayer was precluded from pursing any further refund for 1991. It was also too late for XZY to file a separate refund claim because it too was beyond the time periods allowed by the statute.

Taxpayer argues that the second claim filed on September 8, 2000 was merely a correction of the timely claim filed on October 15, 1999. In support of its argument, Taxpayer cites *Bemis Bros. Bag Co. v. U.S.*, 289 U.S. 28, 53 S.Ct. 454 (1933), *Pink v. US*, 105 F.2d 183 (2nd Cir. 1939), and *U.S. v. Ideal Basic Industries, Inc.*, 404 F.2d 122 (10th Cir. 1968).

The cited cases do not support Taxpayer's argument. In each of the cited cases, the taxpayer was attempting to amend its own claim. The second amended return filed by Taxpayer in this case attempted to claim an overpayment of a separate taxpayer, i.e., XZY's 1991 income tax liability that Taxpayer had paid on October 21, 1998 for XZY. There is no provision in the statute or the regulations that allows one taxpayer to file a claim on behalf of a separate taxpayer for a year in which both of them are required to be treated as separate taxpayers by the Department's regulations.

Taxpayer also argues that the second claim was allowable because it was merely a

correction of a mathematical error in the first IL-870-AD calculations, so it should be allowed to correct that error. This argument fails because the second claim is not merely an attempt to claim a mathematical error in the IL-870-AD calculations. Taxpayer ignores the fact that XZY, a member of Taxpayer's unitary business group for 1991, filed a separate Illinois income and replacement tax return for 1991 as permitted by the statute and regulations for that year. The Department's regulation specifically provides that for 1991 "if a unitary business group does not elect to file a combined return, each Illinois taxpayer member of that group will be treated as a separate taxpayer for all Illinois income tax purposes except for the apportionment of business income." 86 IL. Admin. Code § 100.5205(c). Taxpayer's group did not elect to file a combined return for 1991. Therefore, Taxpayer could not file a claim for refund for XZY because XZY filed a separate income tax return and was required to be treated as a separate taxpayer for all Illinois income tax purposes. The language of the regulation required XZY to file its own refund claim which it failed to do.

Next Taxpayer complains that in computing the amounts for the IL-870-AD the Department included the income of XZY in Taxpayer's combined income for 1991, yet refuses to give Taxpayer credit for the tax of $336,651 paid on XZY's behalf. Taxpayer states that, "This is indefensible." Taxpayer Memo p. 12.

The Department did include the income of XZY in Taxpayer's combined income for 1991 for the purpose of computing the tax for the unitary group because it was a unitary business group. However, because XZY filed a separate return, in apportioning the combined income between Taxpayer and XZY, the Department excluded the XZY premiums from the numerator of the apportionment formula to compute Taxpayer's

liability. The Department used XZY's Illinois premiums as the numerator to compute the XZY liability. Quite properly, the XZY premiums were included in the apportionment denominator in Taxpayer's income apportionment calculation and in XZY's income apportionment calculation. Rather than being "indefensible", the Department's calculations were exactly what was required because separate returns were filed for 1991. The Department's calculations reflected the determination that XZY was a member of Taxpayer's unitary business group that filed a separate return. This is the method specified by the Department's regulations cited above.

Next, Taxpayer argues that Taxpayer's inclusion of XZY's income and apportionment factor in its original claim, was sufficient to toll the statute of limitations, so the Department was on notice that Taxpayer was claiming a refund with respect to XZY. Taxpayer concludes that the second claim for XZY is, therefore, not barred by the statute. Taxpayer cites *Hartmarx Corp. v. Bower*, 309 Ill.App.3d 959, 723 N.E.2d 820 (1st Dist. 1999) a case in which the court held that for apportionment purposes it did not matter whether the unitary group filed separate returns or a combined return. In that case, Hartmarx had elected to file combined returns and the issue was whether certain sales by a member of the unitary group located outside Illinois had to be included in the numerator of taxpayer's apportionment formula under the so-called "throwback rule".

The opinion in *Hartmarx* is inapposite to this case. The Department's regulation provides that if, as in this case, "a unitary group does not elect to file a combined return, then each member of the unitary group will be treated as a separate taxpayer for all Illinois income tax purposes, except for the apportionment of unitary business income." 86 IL. Admin. Code § 100.5205(c). *Hartmarx* involved a unitary business group that

elected to file combined returns. The dispute in the case involved an apportionment issue. The Taxpayer and XZY did not elect to file a combined return for the 1991-tax year and this case does not involve an apportionment issue, so it is both factually and legally distinguishable from *Hartmarx*. Taxpayer asserts that for some purposes no distinction should be made between separate unitary returns and a combined return. The Department's regulation makes it clear that this is not one of those cases, and Taxpayer cites no authority to the contrary.

Taxpayer also asserts that the Department should follow the standards set forth by the Internal Revenue Service and the federal courts for allowing claims to be corrected. Taxpayer states that standard as allowing a correction that, "is based on the same facts stated in the original claim, that the correction requires no additional investigation, and that the taxing authority has not taken final action on the claim—essentially permits taxpayers to correct clerical or math errors in their original refund claims." Taxpayer Memo p. 13. Taxpayer argues that Taxpayer did not raise new facts or new legal grounds in its second amended return claim. It maintains that Taxpayer merely corrected a clerical mistake or a math error.

This argument is without merit. In filing its second amended return, Taxpayer was trying to correct a claim that was not properly filed in the first instance. It was improper because Taxpayer claimed a refund for a member of its unitary business group, XZY, for the 1991-year that was a year for which XZY filed a separate Illinois tax return. The regulations cited above make it clear that XZY was required to be treated as a separate taxpayer for all purposes under the IITA. The proper method for claiming the amount in question was for XZY to file a claim during the claim period authorized by the statute. It

failed to do so. Therefore, Taxpayer's claim for a refund of XZY tax paid was not valid in the first instance.

As part of its argument that the rules established under the Internal Revenue Code apply, Taxpayer argues, citing IITA § 102, that the term "claim for refund" as used in IITA § 909(d), must be construed under the federal rules. IITA § 102 provides:

> Except as otherwise expressly provided or clearly appearing from the context, any term used in this Act shall have the same meaning as when used in a comparable context in the United States Internal Revenue Code of 1954 or any successor law or laws relating to federal income taxes and other provisions of the statutes of the United States relating to federal income taxes as such Code, laws and statutes are in effect for the taxable year. 35 ILCS 5/102.

Taxpayer misconstrues the purpose of IITA § 102. This section is a rule of statutory construction designed to provide uniformity between the IITA and the Internal Revenue Code when the same term is used in both statutes. *Rockwood Holding Co. v. Dept. of Revenue*, 312 Ill.App.3d 1120, 728 N.E.2d 519 (1st Dist. 2000) (holding that IITA § 102 does not by itself incorporate substantive provisions of the Internal Revenue Code) *Bodine Electric v. Allphin*, 70 Ill.App.3d 844, 389 N.E.2d 168 (1st Dist. 1979) Here, Taxpayer is trying to incorporate federal standards on allowing amendments to refund claims into the IITA, although it cites no federal cases that allow one taxpayer to file a claim for an overpayment that it made on behalf of another taxpayer.

Finally, Taxpayer argues that the purpose of a statute of limitations is to protect a potential defendant from a stale claim, and that the Department's argument that FHILC should have filed its own amended separate return elevates form over substance. Taxpayer cites *Zebra Technologies Corp. v. Topinka*, __ Ill.App.3d__, 799 N.E.2d 425 (2003) and *JI Aviation, Inc.*335 Ill.App.3d 905, 781 N.E.2d 469 (1st Dist. 2002). Neither

of these cases supports Taxpayer's argument in this case because both of them are factually and legally distinguishable. In both of these cases, the courts looked at the substance of the transactions underlying the tax deficiency assessments, but neither of them involved the failure to follow the Department tax return filing requirement regulations for unitary business groups.

Taxpayer also alleges that it corrected the XZY separate company filing by paying its audit liability, citing 86 IL. Admin. Code § 100.5280(b)(1). That paragraph provides as follows:

> If, prior to the issuance of a Notice of Deficiency, any of the corporations which did not join in the combined return and the designated agent of the combined group agree that such corporation is a member of the combined group or the designated agent pays all audit deficiencies, the audit liabilities related to that corporation and the combined group will be proposed and processed on a combined return basis. In this instance, the designated agent will be treated as having corrected the combined return in accordance with Section 100.5210(b) of this Part. 86 IL. Admin. Code § 100.5280(b)(1).

This argument fails for three reasons. First, the Department has no record of Taxpayer's unitary business group electing to file a combined return for 1991, and it has no record of Taxpayer ever being designated as the designated agent for the group. Second, Taxpayer paid the combined deficiency on October 21, 1998 which was *after* the notices of deficiency were issued to Taxpayer and XZY on August 17, 1998 and September 2, 1998, respectively. Third, this argument ignores the section in regulation § 100.5280 that applies to years ending prior to December 31, 1993. It provides as follows:

> a) If, on audit, the Department determines that two or more corporations are members of a unitary business group for which no combined return was filed:

> (1) For taxable years ending on or after December 31, 1985 and before December 31, 1993, any audit liabilities determined by the Department will be proposed and processed on a separate unitary return basis. If Notices of Deficiency are issued, they will be issued to each Illinois taxpayer and will reflect that taxpayer's Illinois income tax liability computed on a separate return basis. 86 IL. Admin. Code § 100.5280(a)

In this case, Taxpayer and XZY were members of the same unitary business group for 1991, but they filed separate returns. Therefore, under the language of Regulation § 100.5280(a)(1) the Department treated Taxpayer and XZY as separate taxpayers and issued them separate notices of deficiency. This procedure was consistent with §§ 100.5205(c) and 100.5210(a)(2) cited above. Therefore, Taxpayer did not comply with 86 IL. Admin. Code § 100.5280(b)(1) and correct the separate return filing by XZY by paying its liability.

Finally, Taxpayer is ignoring the principle that the Department's regulations have the force of law. *Hartmarx,* 309 Ill.App.3d at 969 (holding that the Department's regulations have the force and effect of law). Finding that XZY, a separate taxpayer, for the 1991-year should have filed its own amended return claiming a refund as required by the regulations is not placing form over substance. It is following the mandate of the Department's regulations.

THEREFORE, FOR THE REASONS SET FORTH ABOVE, IT IS ORDERED that the Department's motion for summary judgment is granted and the Taxpayer's motion for summary judgment is denied.

Recommendation:

The preceding order on the cross-motions for summary judgment disposes of the

sole issue involved in this matter. Therefore, I recommend that the Department's denial of the second claim for refund filed by Taxpayer on September 8, 2000 be made final, and that the IL-870-AD signed by the Director on June 12, 2001 stand as issued.

Date: 2/6/2004

Charles E. McClellan
Administrative Law Judge